A **UNIVERSITY OF MALAYA MEDICAL CENTRE**

v.

CHOO CHEE KON & ANOR

B HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-1603-2004]
24 DECEMBER 2007

C ***CIVIL PROCEDURE:*** *Injunction - Setting aside - Ex parte injunction order - Failure to give notice - Failure to explain satisfactorily why notice not given - Non-compliance - Rules of the High Court 1980, O. 29 r. 1(2A)(c)*

D This was an application by the defendants to set aside an *ex parte* injunction order dated 21 October 2004, applied for by the plaintiff hospital and granted by this court, restraining the defendants from obstructing in any way the plaintiff or its officers from performing their duties as doctors in treating the defendants' baby in a safe manner, especially the administering of blood E transfusions to the baby whenever deemed necessary. The defendants, by reason of their religious beliefs as Jehovah Witnesses, opposed the administering of blood transfusions to their baby, citing, among others, their constitutional right to practise their religion as guaranteed by arts. 3 and 11 of the F Federal Constitution. The defendants contended, *inter alia*, that the plaintiff had failed to give notice of the *ex parte* application to them when the plaintiff applied for the *ex parte* injunction order or, alternatively, to explain satisfactorily as to why such notice was not given to them. G

Held (allowing the application):

(1) On the facts of the present case, the duty to give notice to the defendants arose on 20 October 2004 itself when the H plaintiff made the decision to file the *ex parte* application on 21 October 2004. The explanation furnished by the plaintiff in para. 23 of its affidavit in support – as to why notice of the *ex parte* application was not given to the defendants – was clearly not satisfactory. The plaintiff alleged that there was a I 'time constraint'. Why was there a 'time constraint'? The plaintiff must give the court a clear explanation, not a general

or vague one. The following facts were also taken into account. The defendants were not elusive parties or strangers to the plaintiff. Indeed, the second defendant was the patient of the plaintiff, who was admitted to the plaintiff as early as 4 October 2004. The first defendant was her husband who had shown deep concern over his wife's health and medical condition. Both defendants could have been easily contacted by the plaintiff's officers or doctors. They had been co-operative (save for their religious beliefs) with the plaintiff's medical team, having had a series of discussions with them. It was clear that the plaintiff had taken the legal duty to inform the defendants of the *ex parte* application, or the legal duty to explain to the court the omission in giving such notice, very lightly. The averment in para. 23 was nothing but mere lip service. Thus, there was clear non-compliance with O. 29 r. 1(2A)(c) of the Rules of the High Court 1980. Since compliance with r. 1(2A)(c) was mandatory, a serious breach had occurred and the *ex parte* order must be set aside. (paras 27, 28, 29 & 30)

Case(s) referred to:
RIH Services (M) Sdn Bhd v. Tanjung Tuan Hotel Sdn Bhd [2002] 3 CLJ 83 CA ***(refd)***

Legislation referred to:
Federal Constitution, arts. 3, 11
Rules of the High Court 1980, O. 29 r. 1(2), (2A)(c), (2B)

Other source(s) referred to:
Malaysian High Court Practice, 2001 Desk Edn 1, p 1032, para 29.1.17

For the plaintiff - Joseph Yeow (N Sharmini with him); M/s Siva Dharma & Assoc
For the defendants - Warrant Cathcart (Malik Imtiaz Sarwar with him); M/s Reuben, Annou & Co

Reported by Suresh Nathan

JUDGMENT

Mohd Hishamudin Yunus J:

[1] The *inter parte* summons in chambers at encl. 11 is an application by the defendants to set aside an *ex parte* injunction order obtained by the plaintiff on 21 October 2004.

[2] The *ex parte* injunction order applied for by the plaintiff and granted by this court is that the defendants are restrained from obstructing or causing obstruction, in any possible way, to the plaintiff or its officers or servants from performing their duties as doctors in treating the defendants' baby in a safe manner especially the administering of blood transfusion to the baby whenever deemed necessary.

[3] The defendants, by reason of their religious beliefs as Jehovah Witnesses, opposed the administering of blood transfusion to their baby citing, among others, their constitutional right to practise their religion as guaranteed by arts. 3 and 11 of the Federal Constitution.

[4] I have allowed the defendants' application to set aside the *ex parte* order with costs. I have also ordered that damages, if any suffered, be assessed by the registrar.

[5] My grounds are as follows.

[6] The first and second defendants were husband and wife. They were also followers of a sect of Christianity known as Jehovah's Witnesses. On 4 October 2004, the second defendant was admitted as a patient to the plaintiff's hospital, the University of Malaya Medical Center ('the Hospital'). The second defendant was pregnant and suffering from complications associated with a heart condition known as Eisenmenger Syndrome. This medical condition placed the second defendant's health at serious risk during her pregnancy. At the time of her admission as a patient, the second defendant was about 25 weeks pregnant.

[7] As a result of vomiting blood on 7 October 2004, the second defendant was transferred to the Coronary Care Unit of the Hospital. Several members of the medical team assigned to care for the second defendant met with her and her husband (the first defendant) to discuss the possibility of her undergoing a caesarean section on 11 October 2004. The second defendant refused to consent to that operation as scheduled, because she wanted to maximize the foetus' chance to live. She was prepared to extend the term of her pregnancy for as long as she could personally manage. The second defendant's decision, which had the full support of the first defendant, was motivated by a desire to protect the sanctity of the feotus' life which is consistent with

the beliefs of the Jehovah's Witnesses, who view the sanctity of life as a fundamental religious principle. The caesarean operation scheduled for 11 October 2004 was therefore cancelled.

[8] On 8 October 2004, the second defendant provided a written directive to the plaintiff setting forth, amongst other matters, her instructions that no blood transfusions (whole blood, red cells, white cells, platelets, or blood plasma) be given to her under any circumstances, even if the doctors deem such measure necessary to preserve her life or health. The directive also stated her willingness to consent to the use of non-blood volume expanders.

[9] Shortly thereafter, a discussion took place between the defendants and the members of the plaintiff's medical team which included:

(a) Professor YK Chan (anaesthetist);

(b) Professor PC Tan (obstetrician);

(c) Dr. Nik Asmah; and

(d) Professor Boey (paediatrician).

[10] At that meeting, the first defendant raised the idea that erythropoietin (rHuEPO), a synthetic hormone that stimulates erythropoiesis, could be administered to the baby as part of non-blood medical management strategy. Further discussions were held between the members of the plaintiff's medical team and representatives of the Jehovah's Witnesses Hospital Liaison Committee (JWHLC) pertaining to the available alternatives to the use of blood.

[11] On 14 October 2004, a further meeting took place between the first defendant, the members of the plaintiff's paediatric team and JWHLC's representatives. At that meeting, Professor Boey (paediatrician) opined that various complications, generally associated with premature babies, may lead to acute blood loss and the possibility that the baby may suffer severe jaundice, which required the use of blood. However, should there be a need for blood transfusion, the first defendant would be first notified.

[12] In response to what was discussed at the meeting, the defendants served a written directive to the plaintiff that no blood transfusion (whole blood, red cells, white cells, platelets, or blood plasma) be given to the defendants' baby under any circumstances whatsoever, even if the physicians were to deem it necessary to preserve its life or health. The directive also stated the defendants' willingness to consent to the use of non-blood volume expanders for their baby.

[13] As Jehovah's Witnesses, the defendants believe that obedience to the Biblical injunction to 'abstain from blood' is of the utmost importance. The defendants regarded this Biblical injunction that rules out transfusion of blood as being fundamental to their worship of God. Their decision to refuse the use of blood transfusion in the baby care was made in accordance with these religious convictions which view the forced administration of blood, a body fluid, as the moral equivalent of rape.

[14] On 18 October 2004, the second defendant complained of a weakening heart. In response, the medical team recommended that a caesarean section be carried out, to which the second defendant consented. The operation was scheduled for 21 October 2004. The members of the plaintiff medical team made a collective decision to refer the mater to the Director of the Hospital, Professor Mohd Amin.

[15] Due to the second defendant's serious condition, the extreme low weight of the baby and the extreme prematurity of the baby, there was every possibility that on 21 October 2004 and thereafter that the baby would be in danger and might require blood transfusion. Professor Mohd Amin instructed lawyers on 20 October 2004 to obtain a court order.

[16] On the following day, 21 October 2004, a writ action was filed in the High Court of Kuala Lumpur by the plaintiff Hospital against the defendants seeking *inter alia* (1) a declaration that the directive of 14 October 2004 is invalid and null and void, and (2) an injunction to restrain the defendants from preventing the plaintiff or its doctors from giving medical treatment to the defendants' baby including the administering of blood transfusion on the baby should the plaintiff deemed it necessary to do so to save the baby's life. Simultaneously, the plaintiff also made an *ex parte* interlocutory application by way of summons in chambers

(supported by a certificate of urgency) for an interlocutory injunction to restrain the defendants from obstructing the plaintiff or its doctors from performing their duties in treating the defendants' baby in a safe manner especially the administering of blood transfusion to the baby should the need arise. The *ex parte* application was heard in chambers at 2.15pm on 21 October, and an *ex parte* injunction order was obtained that *inter alia* permits the plaintiff's medical team to give blood transfusion to the defendants' baby if deemed necessary. The defendants' baby was born at about 11am on 21 October 2004.

[17] A copy of the *ex parte* injunction order was served on the first defendant on 22 October 2004 and on the second defendant through her solicitors, M/s Reuben, Annou & Co on 28 October 2004.

[18] On 5 November 2004, the defendants filed the present summons-in-chambers *via* encl. 11 seeking *inter alia* an order that:

(a) the *ex parte* injunction order dated 21 October 2004 be set aside; and

(b) special and general special damages suffered by the defendants be assessed.

[19] The *ex parte* injunction order lapsed by operation of law on 11 November 2004 pursuant to O. 29 r. 1(2B) of the Rules of the High Court 1980 ('the RHC').

[20] In the defendants' application that is now before me (encl. 11) it will be necessary to determine whether the *ex parte* injunction order should have been or should not have been granted in the first place. This is necessary in order to determine whether damages should be awarded or not (see *RIH Services (M) Sdn. Bhd. v. Tanjung Tuan Hotel Sdn Bhd* [2002] 3 CLJ 83.

[21] In the present case, in seeking to set aside the *ex parte* injunction order of 21 October 2004, the defendants contend, among others, that the plaintiff had failed to give notice of the *ex parte* application to the defendants when the plaintiff applied for the *ex parte* injunction order; or, alternatively to explain satisfactorily as to why such a notice was not given to them. The giving of notice of the *ex parte* application (or the furnishing of an

explanation in the *ex parte* application where such notice was not given) is required by O. 29 r. 1(2A)(c) of the Rules of the High Court 1980.

[22] In my judgment, there is a merit in the defendants' contention that the plaintiff's failure to give notice was not justified. The plaintiff's solicitors had received the instructions to obtain the interlocutory relief on 20 October 2004 and had also on that day completed the bulk of the court papers for filing. On the morning of 21 October 2004, Professor Dato' Dr. Mohd Amin signed his affidavit in support of the plaintiff's *ex parte* application. Later that morning, the caesarean section was performed successfully, and the defendants' baby was born at about 11am.

[23] Unbeknown then to the defendants, the plaintiff's *ex parte* application was filed, and hearing to determine the plaintiff's application for *ex parte* injunctive relief was set for 2.15pm on that day (21 October).

[24] Hence, on 20 October 2004 the plaintiff and their solicitors were making the necessary preparation for the filing of the *ex parte* application and they expected to file the *ex parte* application the following day, 21 October 2004, at the Civil Division of the High Court of Kuala Lumpur at Wisma Denmark *via* a certificate of urgency, hoping to get a hearing if possible on the 21 October itself. This being the scenario, the plaintiff could have – and should have – notified the defendants on 20 October itself of its intention to file at the Civil Division registry of the High Court Kuala Lumpur at Wisma Denmark the *ex parte* application on the next day, 21 October, on a certificate of urgency, so that the defendants could have alerted their solicitors; and so that the defendants' counsel could appear before the court at the hearing of the *ex parte* application and to apply to be given the opportunity to be heard on an *ex parte* opposed basis. But the plaintiff's doctors or solicitors chose not to inform the defendants of the *ex parte* application. Even in the morning of 21 October when the solicitors for the plaintiff was set to file the *ex parte* application, the defendants were still not informed – although the plaintiff had ample opportunity to do so, if the plaintiff had taken the matter of giving notice seriously; which as a matter of law the plaintiff should – all the more so where in this case the plaintiff was conscious of the fact that the defendants were seriously

against the giving of blood transfusion to their baby – not on any irrational ground – but on the ground of religious belief as Jehovah Witnesses. Hence the fact was that the defendants throughout knew nothing about the plaintiff's *ex parte* court application either on the 20 October or on the 21 October – not until Professor Dato' Dr. Mohd Amin mentioned it during the meeting with the first defendant and Mr. Radha Krishnan (an advocate and solicitor and representative of JWHLC) at about 1.30pm on 21 October. Even then the purpose of Prof. Mohd Amin mentioning about the *ex parte* application was not with a view to giving notice as required by law: it was mentioned by him merely in the course of discussion with the first defendant and Mr. Radha Krishna. The first defendant and Mr. Radha Krishnan immediately informed Prof. Mohd Amin that the first defendant wanted the hearing to be held *inter parte* with his lawyer present in court. According to Prof. Mohd Amin he was not able to communicate with the plaintiff's solicitors to convey the first defendant's request, but Professor Mohd Amin did not explain in his affidavit the details of the efforts made by him to contact the plaintiff's solicitors.

[25] Now, with regard to the plaintiff's claim that it was unable to communicate with its solicitors on 21 October prior to the hearing at 2.15pm, I find it difficult to accept this assertion; for between 11am and 2.15pm that day there must have been contact between the plaintiff and its legal counsel because the latter was apparently able to advise the court (during the hearing in chambers at 2.15pm) that the defendants' baby had been born on 11am.

[26] In my judgment, there was no satisfactory explanation whatsoever proffered to the court as to why the defendants were not given notice on 20 October 2004 (or at the very least on the morning of 21 October). The plaintiff's affidavit in support at encl. 2, which was affirmed by Professor Dato' Dr. Mohd Amin bin Jalaludin on 21 October 2004, at para. 23 merely states:

> 23. Saya dinasihatkan oleh doktor-doktor yang merawat defendan kedua bahawa mereka telah memberitahu defendan-defendan bahawa plaintif berhasrat untuk mendapat perintah Mahkamah untuk menjalankan rawatan termasuk transfusi darah atas bayi tetapi atas sebab kesuntukan masa dan memandangkan percubaan terakhir pada 20.10.04 untuk menyelesaikan perkara ini telah gagal, maka plaintif tidak sempat memberi

notis kepada defendan-defendan berhubung dengan permohonan plaintif untuk mendapat satu perintah injunksi interlokutori *ex parte*.

[I have been advised by the doctors treating the second defendant that they have informed the defendants that the plaintiff intend to obtain a Court order to proceed with treatment including blood transfusion on the baby but due to time constraint and because the final attempt on 20.10.04 to resolve the matter failed, therefore the plaintiff had no time to give notice to the defendants regarding the plaintiff's application to obtain an *ex parte* interlocutory injunction order.]

[27] This is too vague an explanation and too lame an excuse. The legal burden is on the plaintiff to satisfy the court as to why it failed to give notice to the defendants. In my opinion, in the present case, the duty to give notice arises on 20 October itself when the plaintiff made the decision to file the *ex parte* application on 21 October. In my judgment, upon examining the explanation furnished in the above para 23, I find that the plaintiff has failed to furnish a satisfactory explanation as to why notice of the *ex parte* application was not given to the defendants. The plaintiff alleges that there was 'time constraint'. Why was there 'time constraint' (kesuntukan masa)? The plaintiff must give the court a clear explanation, not a general or a vague explanation. My finding is that clearly there is no satisfactory explanation given by the plaintiff. In arriving at my finding, besides scrutinizing para 23, I also take into account of the following facts. The defendants were not elusive parties; nor were they strangers to the plaintiff. Indeed, the second defendant was the patient of the plaintiff Hospital, who was admitted to the plaintiff Hospital as early as 4 October; and the first defendant was her husband who had shown deep concern over his wife's health and medical condition; and both defendants could have been easily contacted by the plaintiff's officers or doctors. They had been cooperative (save for their religious beliefs – being Jehovah Witnesses) with the Hospital's medical team and has had a series of discussions with the medical team. On examining the above para 23 it is clear to me that the plaintiff has taken the legal duty to inform the defendants of the *ex parte* application, or the legal duty to explain to the court for the omission in giving such notice, very lightly. In my judgment, the averment at para 23 is nothing but a mere lip service effort.

[28] Thus, there is clear non-compliance of O. 29 r. 1(2A)(c) of the Rules of the High Court. Order 29 r. 1(2) and (2A)(c) of the RHC stipulates:

> (2) Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, such application must be made by summons.
>
> (2A) The affidavit in support shall contain a clear and concise statement:
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> (c) of the facts relied on as justifying application *ex parte*, including details of any notice given to the defendant or, if none has been given, the reason for giving none;

[29] According to the *Malaysian High Court Practice,* 2001 Desk edn. 1, at p. 1032, para [29.1.17]:

> The requirements in r 1(2A) are mandatory. Thus, where a plaintiff fails to give notice of an application made *ex parte* out of fear that it will defeat the purpose of the proceedings, the plaintiff must state in his supporting affidavit the reasons why notice in advance was not given to the defendant. As the introductory sentence in r. 1(2A) states that the affidavit 'shall contain a clear and concise statement', the statement must be stated clearly and concisely and may not be implied: *Delimec Hygiene Sdn Bhd v. EMIC (M) Sdn Bhd* [2001] 5 MLJ 186 at 197.
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> The consequence of the plaintiff's failure to comply with r. 1(2A) is that the injunction must be discharged. To do otherwise would defeat the policy behind the introduction of r. 1(2A): *UMAS Sendirian Berhad v. RHB Bank Berhad & Anor* [2001] 1 AMR 1024.

[30] In my judgment, compliance with r. 1(2A)(c) is mandatory. If there had been non-compliance, it is a very serious breach of the Rules of the High Court and the *ex parte* order must be set aside. This approach is consistent with the policy behind the introduction of r. 1(2A). I therefore, set aside the *ex parte* injunction order due to non-compliance of r. 1(2A)(c) of the RHC.

[Order in terms].